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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 122

H. E. CROOK COMPANY, INC., APPELLANT

v.

UNITED STATES

**MOTION OF C. NEAL BARNEY TO BE ALLOWED
TO FILE A BRIEF**

Amicus Curiae

On Petition for Rehearing

C. NEAL BARNEY

115 Broadway

New York City



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Now comes C. Neal Barney, a member of the Bar of this Court, and moves that he be permitted to file a brief in the above entitled cause *amicus curiae*.

The contract the interpretation of which is in issue in this cause is one of a number of Government contracts of practically similar form and content, and in a matter in which the mover is counsel its interpretation is at present in controversy. The construction of the contract accordingly involves greater issues than those between the parties. As the opinion has the effect of reversing what has long been considered to be settled law, the potential disaster to contractors renders a rehearing important.

Respectfully submitted,

C. NEAL BARNEY

BRIEF OF AMICUS CURIAE.

The Issue.

The issue in this proceeding is the interpretation of a Government contract set forth in the record.

No opinion is expressed in this brief as to the right of the appellant to recover on the facts of the case, but it is contended that the construction of the contract in the decision as prepared means an overturn of law that will work hardship to many contractors.

Argument.

I. THE DECISION.

The decision in the instant case is predicated on the view that the contract did not bind the Government with respect to the time of completion, or in other words, that the Government might delay the progress of the work without responsibility for such delay. In support of this, four assertions are made in the opinion.

FIRST.—The opinion says, "The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Bros. Co. v. United States*, 254 U. S. 83, 86, 65 L. ed. 148, 150, 41 Sup. Ct. Rep. 34."

The provision for changes is contained in Paragraph 17 of the General Provisions (Record, p. 23). This paragraph specifically provides, however, that if changes are made "the cost of such changes shall be estimated * * * and when approved * * * shall be added to or deducted from the contract price."

The reservation of the right to interrupt the stipulated continuity of the work is contained in Paragraph 8 of General Provisions (Record, p. 20). It requires the con-

tractor to "continue without interruption unless otherwise directed by the Government," that is to say, unless the Government makes changes in the contract, in which case, as shown above, the contract price is to be altered as provided in Paragraph 17.

As the opinion now reads, the Government might delay the contractor for ten years and then direct him to complete the contract, and sue him if he failed to do so. The contract certainly was not intended to mean this.

SECOND.—The opinion says, "The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time."

But the contract specifically sets forth, as the opinion states, the approximate completion date for the foundry and machine shop. This was an assurance to the contractor that he was justified in establishing two hundred days as the time within which he could complete his work. The last sentence in paragraph numbered 2 (Record, p. 5) is, "The heating system shall be completed on or before the *contract date* for the completion of the building." There is no warning in this statement that justifies the contractor when bidding in assuming that the building contractors will be "behind-hand nearly a year." His date is fixed, whether the other contractors keep up to time or not.

THIRD.—The opinion says, "There is not a word in the instrument by which" the Government bound itself to a fixed time for the work to come to an end "unless an undertaking contrary to what seems to us the implication is implied."

It is not stated what this implication is based on except the assertions referred to above. The general rule of law

is that where a contractor is obligated to perform within a certain time, there is an implied obligation on the other party (in this case the United States) to do every prerequisite act expressly or impliedly demanded of it by the contract, and not to do anything to delay completion.

United States v. Speed, 8 Wall., 77, 84;

United States v. Smith, 94 U. S., 214;

Nugent Corporation v. United States, 50 C. Cls., 847;

United States v. Muller, 113 U. S., 153;

United States Fidelity & Guaranty Co. v. United States, 53 C. Cls., 561.

The cases of *Wells Bros. Co. v. United States*, 254 U. S., 83, and *Wood v. United States*, 258 U. S., 120, cited in the opinion, strikingly emphasize the difference between the contracts there at issue and the contract in the instant case. In both of those cases there was *express provision* that no claim should be made for damages from delay caused by the Government. They only emphasize that when the Government intends to be released from liability for delay it prepares its contracts so as clearly to do so.

FOURTH.—The opinion says, "Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit."

It does not appear in the record that the parties regarded delays by other contractors as unavoidable. The contract gives for the guidance of the contractor the dates on which the building contractors are to complete their work and says that his contract shall be completed on or before the "*contract date* for the completion of the build-

ing." The view set forth in the opinion would result in the instant contractor being without relief in case of delay by the building contractors even though the Government might have fully recovered its loss from the building contractors resulting from their delay!

It is true the contract contained a provision "Delays caused by acts of the Government will be regarded as unavoidable." This is contained in Paragraph 14 of the General Provisions, which must be read with Paragraphs 12 and 13. When so read it is perfectly obvious that delays caused by the Government are to be regarded as unavoidable in determining whether or not extensions of time will be given the contractor, and this is the only connection this clause has with the rest of the contract. Paragraph 14 purports only to contain the causes for which extensions will be allowed, which in Paragraph 12 are said to be "hereinafter enumerated."

II. GENERAL RULES OF CONSTRUCTION.

While the findings of fact do not state that the contract itself was prepared by the Government, it is obvious that the Specifications (Record, p. 5) and General Provisions (Record, p. 19) which form part of the contract, and contain the clauses the interpretation of which is at issue, were prepared by the United States.

The recent case of *Reading Steel Casting Co. v. United States*, 268 U. S., 186, follows a long line of cases in holding that a contract with the United States is construable and the rights of the parties determinable on the same principles as if the contract were between individuals.

In harmony with the principle laid down in that case, it has been held that where one party prepares a contract and the language is ambiguous, the Court will give the

benefit of the doubt to the other party. This certainly does not seem to be done in the instant opinion.

Garrison v. United States, 7 Wall., 688;

United States v. Newport News, etc., 178 Fed., 194;

Scully v. United States, 197 Fed., 327.

III. CONCLUSION.

Construction of the contract in the light of previous decisions does not permit the interpretation given in the opinion. The appellant should be permitted a rehearing.

Respectfully submitted,

C. NEAL BARNEY,

Amicus Curiae.